No. 10-284

OCT 27 2010

IN THE

Supreme Court of the United States

CITY OF COLTON,

Petitioner,

v.

AMERICAN PROMOTIONAL EVENTS, INC. – WEST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the well-established principle that a precisely drawn, detailed statute preempts more general remedies, in holding that a municipality seeking declaratory relief regarding hypothetical future liability for response costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767, codified as amended at 42 U.S.C. §§ 9601-9675, cannot obtain relief under the general provisions of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), but must instead satisfy the statutory prerequisites to declaratory relief specifically set forth in CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2).

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state the following with respect to the non-governmental corporate respondents listed below:

American Promotional Events, Inc. - West

American Promotional Events, Inc., is the parent corporation of respondent American Promotional Events, Inc. – West, and there is no publicly held corporation that owns more than 10% of its stock.

Astro Pyrotechnics, Inc.

Astro Pyrotechnics, Inc., has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock.

Black & Decker Inc.

Black & Decker Inc. is an indirectly wholly owned subsidiary of The Black & Decker Corporation. The Black & Decker Corporation is a wholly owned subsidiary of Stanley Black & Decker, Inc., a publicly traded corporation.

Emhart Industries, Inc.

Black & Decker Inc. was the sole shareholder of Emhart Industries, Inc., until the latter was dissolved as a corporation in 2002.

Goodrich Corporation

Goodrich Corporation has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock.

Kwikset Locks, Inc.

Emhart Industries, Inc., was the sole shareholder of Kwikset Locks, Inc., until the latter was dissolved as a corporation in 1958.

Pyro Spectaculars, Inc.

Pyro Spectaculars, Inc., has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock.

Trojan Fireworks, Co.

Trojan Fireworks Co. has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock.

Whittaker Corporation

Meggitt America, Inc., is the parent corporation of Whittaker Corporation. Meggitt PLC is a public limited company organized under the laws of England and Wales and is the ultimate parent company of Meggitt America, Inc.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Petitioner contends that certiorari is merited because the circuits are allegedly divided over the question whether plaintiffs who fail to establish liability for past response costs under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, and are therefore barred from obtaining declaratory relief under CERCLA's specifically tailored provision governing such relief (CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2)), can nonetheless seek declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Petitioner's contention is incorrect. There is no circuit conflict over the question presented; indeed, the court below is the first appellate court to have decided it. Moreover, the court of appeals correctly applied long-established principles of statutory construction and this Court's settled case law in reaching the unremarkable conclusion that a specific congressionally enacted remedial scheme trumps a more general one. Further review of this narrow question of first impression is not warranted.

STATEMENT OF CASE

I. Legal Background

Recognizing the need to provide legal structure, technical guidance, and systematic funding for handling non-petroleum hazardous waste sites, in 1980 Congress enacted CERCLA as "a comprehensive statutory scheme to respond to environmental threats, obtain compensation from those responsible for the polluting activities, and assign liability to responsible parties." *United States v. W.R. Grace &*

Co., 429 F.3d 1224, 1227 (9th Cir. 2005). CERCLA confers substantial authority on the federal, state, and tribal governments to clean up hazardous waste sites and recover the costs (referred to as "response costs") from responsible parties. *E.g.*, 42 U.S.C. § 9607(a)(1-4)(A). In addition, CERCLA allows a non-sovereign plaintiff (*i.e.*, a party other than the United States, a State, or an Indian Tribe) who incurs response costs to recover such costs if the plaintiff establishes:

> (1) the property at issue is a "facility" as defined in 42 U.S.C. § 9601(9); (2) a "release" or "threatened release" of a "hazardous substance" has occurred; (3) the "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan"; and (4) the defendants are in one of four classes of persons subject to liability under § 9607(a).

Carson Harbor Vill. v. Cnty. of Los Angeles, 433 F.3d 1260, 1265 (9th Cir. 2006). The plaintiff has "the burden of proving that cleanup costs associated with remedial actions are consistent with the National Contingency Plan" in order "to recover those cleanup costs under CERCLA." *Id.* (citing 42 U.S.C. § 9607(a)(1-4)(B)).

The National Contingency Plan ("NCP") "specifies procedures for preparing and responding to contaminations and was promulgated by the Environmental Protection Agency (EPA)." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 n.2

(2004).[1] The NCP "outlines specific steps parties must take in choosing a remedial action plan and cleaning up hazardous waste. . . . [It] requires that the party seeking recovery provide an opportunity for public comment and participation, conduct a remedial site investigation, and prepare a feasibility study." *Carson Harbor Vill.*, 433 F.3d at 1265-66 (citing 40 C.F.R. § 300.700(c)(5)(vii)-(viii), (c)(6)).

Thus, CERCLA gives non-sovereign parties like petitioner the ability to exert powerful cost recovery tools that Congress intended primarily for sovereign governments. As an important check-and-balance on allowing use of these tools by non-sovereign entities, however, Congress mandated consistency with the NCP and CERCLA-quality cleanups as prerequisites to recovery.

II. Factual and Procedural Background

In 2002, petitioner detected low levels of perchlorate in certain of its municipal water supply wells. Although the perchlorate levels did not then violate any enforceable water quality standards promulgated by the California Department of Health Services, which regulates water quality, petitioner nonetheless chose to take the wells out of service and institute a wellhead treatment program to eliminate the perchlorate. Pet. App. 6.

In 2005, petitioner filed suit under CERCLA against numerous entities, including respondents, claiming that they were responsible for the costs in-

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[1] The NCP is formally titled the National Oil and Hazardous Substances Pollution Contingency Plan and is set forth at 40 C.F.R. Part 300, *et seq.*

curred by petitioner in implementing its wellhead treatment program. Petitioner sought retrospective monetary relief as well as a declaratory judgment governing future response costs. The district court granted summary judgment for all defendants, holding that petitioner had failed to comply with the NCP in connection with the wellhead treatment program and was therefore precluded from recovering response costs under CERCLA § 107(a). Pet. App. 6-7; *id.* at 20-48.

As required by CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), the district court also entered judgment in favor of respondents on petitioner's claim for a declaratory judgment regarding future response costs for its wellhead treatment program:

> Plaintiff's eighth claim for Declaratory Relief pursuant to the Declaratory Judgment Act (28 U.S.C. § 2201, 2202) seeks a declaration of the parties [*sic*] legal rights and obligations in connection with Plaintiff's first and second claims for relief for recovery of response costs [under CERCLA § 107] and contribution [under CERCLA § 113(f)], respectively. Because the Court grants summary judgment in Defendants' favor on Plaintiff's first and second claims for relief, Defendants are entitled to summary judgment in their favor on Plaintiff's eighth claim for [declaratory] relief as well.

Pet. App. 42 n.16. Shortly thereafter, the district court entered judgment in favor of respondents, dismissing petitioner's CERCLA and declaratory judgment claims. Dkt. entry 578.

Petitioner appealed, and the court of appeals affirmed. Pet. App. 1-19. Petitioner conceded, how-

ever, "that it failed to comply with the national contingency plan in its past response action" regarding the wellhead treatment program. *Id.* at 8. The court of appeals therefore held that petitioner was precluded from recovering those costs under CERCLA. *Id.*

Notwithstanding its lack of entitlement to recover any response costs, petitioner argued on appeal that it was entitled to a declaratory judgment establishing respondents' hypothetical liability for future NCP-compliant, CERCLA-quality response costs that might be incurred by petitioner. Pet. App. 9. The court of appeals held that this request for relief was ripe for decision, notwithstanding its hypothetical nature, because petitioner had "incurred costs in responding to the contamination" and Ninth Circuit law did not require "that a party incur *recoverable*—*i.e.*, necessary and NCP-compliant—response costs before its claim for declaratory relief is ripe." *Id.* at 10-11. The court of appeals also held that petitioner's lack of a cause of action for past response costs did not deprive the federal courts of subject matter jurisdiction over petitioner's request for declaratory relief, reasoning that petitioner's "nonfrivolous assertion of a CERCLA declaratory relief claim is . . . sufficient to confer federal subject matter jurisdiction." *Id.* at 13-14.

Turning to the merits of petitioner's request for prospective declaratory relief imposing potential liability for future response costs, the court of appeals held that the declaratory-judgment provision in CERCLA § 113(g)(2) governs the right to declaratory relief in CERCLA actions:

> Although [petitioner's] complaint referred to the Declaratory Judgment Act rather than

> CERCLA section 113(g)(2), the latter provision clearly governs this initial cost-recovery action. Because "a precisely drawn, detailed statute pre-empts more general remedies," *Hinck v. United States*, 550 U.S. 501, 506 (2007) (internal quotation marks omitted), we must consider whether [petitioner] was entitled to declaratory relief under CERCLA's more detailed declaratory relief provision.

Pet. App. 16.

The court of appeals then considered the specific provisions of CERCLA § 113(g)(2) governing the availability of declaratory relief. Noting that the declaratory relief contemplated by § 113(g)(2) "pertains to 'liability for response costs,'" the court reasoned that "[s]uch 'liability for response costs' must refer to the response costs sought in the initial cost-recovery action, given that the sentence later refers to 'any *subsequent* action or actions to recover *further* response costs.'" Pet. App. 16. Petitioner, however, had not succeeded in establishing any such "liability for response costs":

> [Petitioner] has failed to establish present liability because of its conceded failure to comply with the NCP but seeks a declaratory judgment on *future* liability. Section 113(g)(2), however, does not provide for such relief. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

Id. at 17 (citation omitted; emphasis in original). As the court explained, "Congress specified a mechanism whereby a declaration of liability for costs al-

ready incurred has preclusive effect in future proceedings as to costs yet to be incurred. If Congress had intended for a declaration of future liability to be available" even absent any showing of liability for past response costs (as here), "it could have provided that 'the court shall enter a declaratory judgment on liability for *further* response costs.' That it did not leads us to conclude that declaratory relief is available only if liability for past costs has been established under section 107." *Id.*

The court of appeals also rejected petitioner's contention that "CERCLA's goal" of encouraging cleanups supported petitioner's request for relief. Pet. App. 17. As the court observed, "CERCLA's goal . . . is not simply to encourage private response, but rather to 'make the party seeking response costs choose a cost-effective course of action to protect public health and the environment' and to achieve 'a CERCLA-quality cleanup.'" *Id.* at 17-18 (citation omitted). "Providing declaratory relief based on mere assurances of future compliance" would "create little incentive" for initial NCP compliance and would require courts "to make complicated determinations as to which defendants are responsible for what proportion of the release, without any assurance that the plaintiff would ever" conduct a proper cleanup. *Id.* at 18. Accordingly, the court concluded that "CERCLA's purposes would be better served by encouraging a plaintiff to come to court only after demonstrating its commitment to comply with the NCP and undertake a CERCLA-quality cleanup." *Id.*

REASONS FOR DENYING THE WRIT

Petitioner does not challenge, and indeed concedes (Pet. 11-12, 19-20), the correctness of the court of appeals' holdings that petitioner's failure to com-

ply with the NCP precludes it from obtaining either an award of past response costs under CERCLA § 107(a) or declaratory relief regarding potential future response costs under CERCLA § 113(g)(2). As the case comes to this Court, therefore, it is established that petitioner has no claim for relief under CERCLA itself. The only issue raised by petitioner and fairly included in the question presented is whether, notwithstanding its inability to establish any right to relief under CERCLA itself (including CERCLA's specific provision governing declaratory relief, CERCLA § 113(g)(2)), petitioner should nonetheless be permitted to obtain prospective and hypothetical relief under the general provisions of the Declaratory Judgment Act. Petitioner's implausible claim that such relief is available under the Declaratory Judgment Act was correctly rejected below, has never been addressed by any other appellate court, and does not merit further review.

I. There Is No Conflict In The Circuits On The Question Presented

The court of appeals held that the declaratory relief provision of CERCLA § 113(g)(2), and not the more general terms of the Declaratory Judgment Act, "clearly governs this initial cost-recovery action," based on this Court's instruction that "'a precisely drawn, detailed statute pre-empts more general remedies.'" Pet. App. 16 (quoting *Hinck*, 550 U.S. at 506). In reaching that conclusion, the court of appeals did not reference any decision by any other appellate court that has resolved this narrow question of the interplay between the Declaratory Judgment

Act and CERCLA § 113(g)(2), and respondents are aware of no such decision.[2]

Since none of the other circuits has reached the question presented here, there is no conflict that could possibly justify this Court's intervention. Petitioner nonetheless contends that the decision below conflicts with *County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991) (per curiam), and *United States v. Davis*, 261 F.3d 1, 46 (1st Cir. 2001). In reality, however, neither *Tinney* nor *Davis* even resolves the question presented, let alone in a manner that gives rise to a circuit conflict.

A. *Tinney* Does Not Conflict With The Decision Below

In *Tinney*, plaintiffs brought a CERCLA action to recover costs incurred to investigate and close a landfill—no request for a declaratory judgment regarding future costs was at issue. 933 F.2d at 1510. The dis-

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[2] The court of appeals did comment that some courts "have held or suggested that recoverable past costs are a sine qua non for declaratory relief *under CERCLA*," and that others "have held or suggested that declaratory relief may be available even in the absence of recoverable past costs." Pet. App. 15 (emphasis added). None of these cases, however, resolves the question whether declaratory relief is available *under the Declaratory Judgment Act* in the absence of recoverable past costs, and (as discussed in text below) the two cases cited by the court of appeals as allegedly indicating that declaratory relief may be available do *not* hold that the Declaratory Judgment Act authorizes relief in these circumstances, and are instead entirely consistent with the resolution of that issue reached by the court below.

trict court dismissed the claims on summary judgment for failure to comply with the NCP. *Id.* at 1511. The Tenth Circuit affirmed, holding (consistent with the decision below in this case) that "[p]roof of response costs incurred 'consistent with' the NCP is . . . an element of a prima facie private cost recovery action under CERCLA." *Id.* at 1512. Because the plaintiffs had "incurred no costs consistent with the NCP," the court concluded that "CERCLA provides them no remedy." *Id.* Thus, the *Tinney* court's actual holding is entirely consistent with the reasoning and holding of the decision below.

To be sure, the *Tinney* court went on to comment in passing that "there are some circumstances in which a CERCLA plaintiff *may* be entitled to a declaration of the defendant's liability even though the plaintiff has not yet established that *all* of its claimed response costs were incurred consistent with the NCP," such as cases "in which the factual record does not permit a determination of consistency with the NCP at the time the motion for summary judgment is filed" or "the plaintiff seeks only a declaration of the defendant's liability for future costs incurred consistent with the NCP." 933 F.2d at 1513 (emphases added). Contrary to petitioner's assertions, this passing observation does not give rise to a circuit conflict.

In the first place, the comment on which petitioner relies is unquestionably pure dictum. On its face, it states only that a plaintiff "*may*" be entitled to declaratory relief in some potential situations. The hypothetical circumstance being described—that of a plaintiff who has not yet had the opportunity to establish NCP compliance—was *not* before the court in *Tinney*, as the court explicitly emphasized imme-

diately after the passage cited by petitioner. *See* 933 F.2d at 1513 ("In cases such as this one, however, where there is a fully developed record on which to make the NCP consistency determination, there is nothing to be gained by delaying this determination until trial."). Thus, this passing dictum regarding fact situations not before the court plainly is not (and does not purport to be) a binding statement of the law, and thus it cannot support petitioner's claim of a circuit conflict.

Second, upon careful examination, this dictum is of no assistance to petitioner even on its own terms. The hypothetical situation commented upon by the *Tinney* court was one in which "plaintiff has not yet established that *all* of its claimed response costs were incurred consistent with the NCP," 933 F.2d at 1513 (emphasis added)—not situations in which, as here, the court has already found that *none* of the plaintiff's costs were NCP-compliant. Thus, in the district court cases cited by the *Tinney* court as illustrative, there appears to have been no doubt that *some* recoverable response costs had been incurred by the plaintiff who was seeking declaratory relief.[3]

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[3] *See, e.g., Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1000 (D.N.J.) ("Remedial investigations such as the one undertaken by Southland are consistently held to be within the scope of response costs."), *modified in part on other grounds*, No. Civ. 88-0700, 1988 WL 125855 (D.N.J. Nov 23, 1988); *United States v. Mottolo*, 695 F. Supp. 615, 623 (D.N.H. 1988) ("[i]t is undisputed that the United States and New Hampshire *have incurred* and face future response costs") (emphasis added); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 709 (D.N.J. 1988) ("it is clear that certain items which T &

[Footnote continued on next page]

Here, by contrast, it is undisputed that *none* of the past cleanup costs asserted in this case were recoverable under CERCLA.

In light of the foregoing, it is not surprising that, in the nearly twenty years since the Tenth Circuit made its passing comment in *Tinney*, no court has ever rendered a published opinion granting a declaratory judgment awarding future CERCLA cleanup costs even though the court has concluded that the plaintiff failed to establish any NCP-compliant response costs and is therefore unable to obtain relief under CERCLA § 107. At most, some district courts have concluded that proof of NCP compliance might not be necessary where the plaintiff's existing costs are preliminary, representing the earliest stages of monitoring and evaluating a release of hazardous substances.[4] The instant case, in which petitioner "concede[d] . . . that it failed to comply with the national contingency plan in its past response action" (Pet. App. 8), is far removed from such circumstances.

In short, the *Tinney* court's holding is entirely in accord with the decision below, and its cryptic dictum regarding the possible availability of declaratory relief in hypothetical circumstances not before the court does not speak to the factual circumstances of

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[Footnote continued from previous page]

E seeks to recover are included within the meaning of response costs under CERCLA").

[4] *See, e.g., Bowen Eng'g v. Estate of Reeve*, 799 F. Supp. 467, 477 (D.N.J. 1992), *aff'd*, 19 F.3d 642 (3d Cir. 1994).

this case and, in any event, falls far short of a binding legal pronouncement that could give rise to a circuit conflict. Petitioner's claim of a conflict between *Tinney* and the decision below is unfounded.

B. *Davis* Does Not Conflict With The Decision Below

Petitioner's claim of a conflict between the decision below and the First Circuit's decision in *Davis* is equally unfounded. In *Davis*, the United States sued defendant United Technologies Corporation ("UTC") under CERCLA § 107 to recover costs incurred by the government in cleaning up a contaminated site. 261 F.3d at 14-15. During the first phase of the case, the district court found UTC jointly and severally liable for the government's cleanup costs. *Id.* at 14. UTC sought contribution (including declaratory relief with respect to future cleanup costs) from other potentially responsible parties under CERCLA's express contribution provision, CERCLA § 113(f), 42 U.S.C. § 9613(f), and the district court entered declaratory judgment allocating a share of responsibility for UTC's future cleanup costs to certain defendants. *Id.* at 15, 18.[5]

The First Circuit affirmed the award of declaratory relief. The court held that CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), authorizes declaratory relief in the context of contribution claims brought under

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[5] CERCLA creates two "clearly distinct" rights to sue for monetary relief: "a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances, §§ 113(f)(1), 113(f)(3)(B)." *Cooper Indus.*, 543 U.S. at 163 & n.3.

CERCLA § 113(f), 42 U.S.C. § 9613(f): "[T]he Ninth and Tenth Circuits have taken the position, as we do here, that § 9613(g)(2), the declaratory judgment provision of CERCLA, applies to § 9613(f) contribution actions for both past and future response costs." 261 F.3d at 46.

As a result of its holding that § 113(g)(2) authorized the declaratory relief awarded by the district court, the First Circuit concluded that it "need not address in detail the [defendants'] arguments that the district court's entry of a declaratory judgment was improper under the Declaratory Judgment Act because there was no case or controversy permitting the court to act." 261 F.3d at 47. In the court's view, UTC's binding obligation to pay cleanup costs (pursuant to a consent decree entered in resolution of the CERCLA § 107 cost-recovery claims brought by the United States) created a sufficient actual controversy between UTC and the contribution defendants to support declaratory relief under CERCLA § 113(g)(2) allocating cleanup costs among UTC and the defendants. *Id.* at 47-49.

Petitioner thus errs in characterizing *Davis* as holding "that a CERCLA plaintiff was entitled to declaratory relief for future response costs *under the Declaratory Judgment Act*, as well as CERCLA section 113(g)(2)." Pet. 16 (emphasis added). *Davis* explicitly and unequivocally holds instead that, in a contribution action under CERCLA § 113(f), claims for declaratory relief with respect to future CERCLA cleanup costs arise under and are governed by CERCLA's declaratory judgment provision, CERCLA § 113(g)(2): "§ 9613(g)(2) . . . applies to § 9613(f) contribution actions for both past and future response costs." 261 F.3d at 46. That holding is entirely con-

sistent with the decision below, which did *not* involve a contribution action under § 113(f) but rather a cost recovery action under § 107(a), and which in any event reached the analogous conclusion that claims for declaratory relief in cost-recovery actions are likewise governed by CERCLA § 113(g)(2). Nowhere does *Davis* hold or suggest that a plaintiff (like petitioner) in a cost recovery action who is *not* entitled to proceed under CERCLA § 113(g)(2) could nonetheless obtain relief under the Declaratory Judgment Act, and any such suggestion would have been mere dictum in any event because relief under § 113(g)(2) *was* available in *Davis*. There is therefore no possible conflict between *Davis* and the decision below.[6]

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[6] Petitioner also points to *Reichhold, Inc. v. United States Metals Refining Co.*, 522 F. Supp. 2d 724, 728 (D.N.J. 2007). Pet. 20. That district court decision is likewise consistent with the decision below. The *Reichhold* court stated that "CERCLA does not specifically provide for declaratory relief for § 113(f) contribution claims, so a party must satisfy the requirements of the Declaratory Judgment Act in order to be entitled to declaratory relief under section 113(f)." 522 F. Supp. 2d at 728. Whatever the validity or import of that statement, it has nothing to do with this case, which was not a contribution action involving declaratory relief under CERCLA § 113(f) but was instead a putative cost recovery action under CERCLA § 107(a), where it is undisputed that CERCLA *does* "specifically provide for declaratory relief," in § 113(g)(2). *Reichhold* itself illustrates this crucial distinction, because after making the statement cited by petitioner with respect to contribution actions, the *Reichhold* court went on to adopt precisely the same position as the court below with respect to declaratory relief in cost recovery actions: "To be entitled to declaratory relief *under § 107(a)*, a party need

[Footnote continued on next page]

II. The Decision Below Was Correctly Decided

A. The Decision Below Is Consistent With This Court's Jurisprudence Giving Effect To More Specific Statutory Remedies

The decision below embraces this Court's jurisprudence that a specific and detailed statutory remedy will be given effect in lieu of a more general remedy. Pet. App. 16 (citing *Hinck,* 550 U.S. at 506). That rule enjoys a long history of support in this Court's prior decisions. "In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976) (holding that the Civil Rights Act of 1964 preempted all other "literally applicable" remedies for federal employment discrimination); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (the provision of an express means of redress indicates that Congress did not intend to leave a broader remedy open); *Block v. North Dakota ex rel Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 284-85 (1983) (allowing general remedy of an "officer's suit" to avoid statute of limitations in the Quiet Title Act would undermine "all of the carefully crafted provisions of the [Act] deemed necessary for the protection of the national public interest").

[Footnote continued from previous page]

only prove liability *for costs already incurred*." *Id.* at 729 (emphases added).

In this case, petitioner seeks relief under a general remedial provision (the Declaratory Judgment Act) because petitioner is unable to meet the requirements for relief under the specifically applicable remedial provision (CERCLA § 113(g)(2)) and is concerned about a potential statute-of-limitations bar to such relief in a separate case. Pet. App. 12-13. But the fact that petitioner faces such obstacles is no justification for disregarding the rule that specific statutory remedies preempt general ones. To the contrary, Congress's enactment of careful tailored limitations on the availability of declaratory relief under CERCLA would be rendered nugatory if claimants could evade those limitations at will merely by seeking relief under a more general remedial statute. *See Brown*, 425 U.S. at 833 ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."); *Block*, 461 U.S. at 285 (same).

This Court's holding in *EC Term of Years Trust v. United States*, 550 U.S. 429 (2007), is instructive. The plaintiff in that case challenged a tax levy under the general tax refund statute, 28 U.S.C. § 1346, instead of the statute specifically authorizing claims of wrongful tax levy, 26 U.S.C. § 7426, in an effort to avoid the nine-month limitation period applicable to the latter claim. This Court unanimously rejected the plaintiff's attempt to "effortlessly evade" the limitations period governing the more specific remedy, explaining that "[i]t braces the preemption claim when resort to a general remedy would effectively extend the limitations period for the specific one." 550 U.S. at 434. Thus, *EC Term of Years* confirms that petitioner's desire to circumvent the statute of

limitations is not a valid reason for eschewing the better-fitted statutory remedy.

B. *Hinck* Is Applicable And Section 113(g)(2) Does Not Authorize Separate And Distinct Remedies

Petitioner challenges the merits of the decision below, arguing that it was wrongly decided because *Hinck* is inapplicable and, under *Morton v. Mancari*, 417 U.S. 535 (1974), § 113(g)(2) and the Declaratory Judgment Act should be construed to provide separate and distinct declaratory judgment remedies in CERCLA actions. Pet. 18-29. Those arguments are incorrect, and in any event provide no basis for a grant of certiorari.

First, the Declaratory Judgment Act is purely remedial in nature; it does not supply either an independent basis for federal jurisdiction[7] or a federal cause of action.[8] In this case, petitioner's conceded failure to comply with the NCP before filing suit

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[7] *Cat Tech LLC v. TubeMaster, Inc.*, 528 F.3d 871, 879 (Fed. Cir. 2008) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937)) (Declaratory Judgment Act applies "only if the court has jurisdiction from some other source"); *Rueth v. EPA*, 13 F.3d 227, 231 (7th Cir. 1993) ("The Declaratory Judgment Act . . . is not an independent grant of jurisdiction, rather jurisdiction must be predicated on some other statute.").

[8] *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007) ("[28 U.S.C.] § 2201 does not create an independent cause of action"); *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982) ("Section 2201 does not provide an independent cause of action for determination of the constitutionality of a statute").

doomed its CERCLA case. Indeed, petitioner now concedes that for purposes of this case it has no right to either a cost recovery remedy or declaratory relief under the provisions of CERCLA itself, and thus it has no federal cause of action (and no remaining basis for federal jurisdiction). Petitioner cannot rely on the Declaratory Judgment Act to supply those missing elements of its claim.[9]

Second, Petitioner claims that the decision below is inconsistent with *Mancari*, 417 U.S. at 549. Pet. 22-23. Plainly there could be no actual conflict be-

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[9] In addition to these threshold obstacles to reaching the merits of the question presented, an additional hurdle presents itself: whether petitioner's request for relief satisfies the ripeness requirement. *See, e.g., Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotation marks omitted). Although the court of appeals deemed petitioner's request for future declaratory relief ripe in light of Ninth Circuit precedent (Pet. App. 10-11), the declaratory judgment sought by petitioner would not fully resolve the parties' dispute, because it would establish liability only for what is at present a hypothetical category of damages—namely, cleanup costs (if any) that petitioner subsequently proves to have been the result of an NCP-compliant and CERCLA-quality cleanup. This Court has declined to award declaratory relief that resolves only some, but not all, of the parties' dispute. *See, e.g., Calderon v. Ashmus*, 523 U.S. 740, 749 (1998) (rejecting declaratory relief where "[t]he present declaratory judgment action would not completely resolve [the plaintiffs'] challenges, but would simply carve out one issue in the dispute for separate adjudication").

tween *Mancari* and this case, because they involve entirely different and wholly unrelated statutory schemes. Nor is there any inconsistency in reasoning between the two cases. *Mancari* merely reaffirmed the principle that "repeals by implication are not favored," 417 U.S. at 549 (internal quotation marks omitted), but that principle has no application here, where the court below did not hold or suggest that CERCLA § 113(g)(2) has repealed the Declaratory Judgment Act in all of its applications. In *Mancari*, the claim was that the Indian employment preference created by the Indian Reorganization Act of 1934 had been completely "eliminate[d]" and deprived of any continuing effect by the Equal Employment Opportunity Act of 1972. 417 U.S. at 548; *see id.* at 545, 547. Here, by contrast, the Declaratory Judgment Act has not been "eliminate[d]"; it continues to operate in a wide array of contexts.

Moreover, unlike the present case, in *Mancari* there was no claim that the Equal Employment Opportunity Act was a more specific remedial statute that preempted the more general Indian Reorganization Act. In fact, precisely the opposite was true. As the Court explained:

> the Indian preference statute is a specific provision applying to a very specific situation. The 1972 [Equal Employment Opportunity] Act, on the other hand, is of general application. Where there is no clear intention otherwise, *a specific statute will not be controlled or nullified by a general one*, regardless of the priority of enactment.

417 U.S. at 550-51 (emphasis added). Precisely the same preference for specific over general statutes undergirds the decision in this case. Giving effect to

the more specific enactment is even more appropriate in this case than it was in *Mancari*, because the precisely drawn language of § 113(g)(2) was enacted in 1986, long after the Declaratory Judgment Act was enacted in 1934.[10] Thus, under *Mancari*, the decision below was correctly decided.

Third, recognizing a backdoor route to declaratory relief in CERCLA cost recovery cases by means of the Declaratory Judgment Act would emasculate the statutory scheme that requires NCP compliance and a CERCLA-quality cleanup as a prerequisite to recovery and declaratory relief. As the court below recognized, the detailed provisions of § 113(g)(2) have a clear purpose: (1) to encourage CERCLA plaintiffs to come to court only after demonstrating their commitment to comply with the NCP; and (2) to avoid costly relitigation of threshold issues. Pet. App. 17-19. To allow petitioner to circumvent these safeguards in a CERCLA case by pursuing declaratory

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[10] *See* Declaratory Judgment Act of June 14, 1934, ch. 512, 48 Stat. 955 (codified as amended at 28 U.S.C. § 2201). In 1986, Congress amended CERCLA § 113 to its present form. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113, 100 Stat. 1613, 1647-52. It is worth noting that prior to that 1986 amendment, the courts appeared to allow for a declaratory judgment on future costs only after a finding of past costs that were NCP-compliant. *See, e.g., Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892-93 (9th Cir. 1986). The few district courts that reached the issue consistently denied declaratory relief when the plaintiff had not established a valid CERCLA claim for past costs. *See, e.g., Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1450 (S.D. Fla. 1984); *D'Imperio v. United States*, 575 F. Supp. 248, 251-52 (D.N.J. 1983).

relief under the Declaratory Judgment Act would undermine important statutory protections and frustrate the goals of CERCLA's carefully circumscribed declaratory remedy.[11]

CONCLUSION

Petitioner's disagreement with the decision below, and its arguments regarding what it would like the law to be, provide no basis for this Court's review. As shown above, there is no conflict among the circuits, and no conflict with any decision of this Court. Petitioner merely disputes the court of appeals' application of long-settled principles of statutory construction to resolve a narrow statutory question of first impression that is unlikely to arise with any frequency in the future. For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHRISTOPHER T. JOHNSON

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[11] Petitioner also errs in citing *United States v. USX Corp.*, 68 F.3d 811, 819 n.17 (3d Cir. 1995), for the proposition that "a plaintiff who has failed to comply with the NCP in its past response action may fully comply with the NCP in its future response action." Pet. 28. *USX* does not so hold. The entirety of the *USX* footnote cited by petitioner is as follows: "Essentially, § 113(g)(2) mandates collateral estoppel effect to a liability determination. Of course, a defendant would remain able to contest the amount of response costs or whether the work undertaken was consistent with the national contingency plan." 68 F.3d at 819 n.17. This footnote, which is itself pure dicta, does not state or imply the broad proposition asserted by petitioner.

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